International Business Machines Corporation *and* Communications Workers of America, Local 1120, AFL–CIO. Case 3–CA–22062

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On May 12, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed cross-exceptions and supporting briefs. All parties filed answering briefs, with the Respondent and Charging Party also filing reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Business Machines Corporation, Poughkeepsie and East Fishkill, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert Ellison, *Esq.,* for the General Counsel.
Michael A. Putetti Esq., Scott B. Gilly Esq., and *Greg Meyers Esq.,* for the Respondent.
M. Christina Norum, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Poughkeepsie, New York, on March 7 to 9, 2000. The charge and amended charges were filed by the Union on July 30, August 27, and September 29, 1999. A complaint and notice of hearing was issued on December 22, 1999, and alleged, in substance, as follows:

That on or about July 23 and September 14, 1999, the Respondent, by certain supervisory personnel, threatened employees with disciplinary action if they displayed prounion signs in the Company's parking lots. In this regard, the General Counsel, at the hearing, argued that inasmuch as the Company has a policy prohibiting certain signs, has notified maintenance of this policy and has not revoked or waived the policy, the Respondent's enforcement of the policy, even in the absence of explicitly threatened disciplinary action, would constitute an illegal rule prohibiting union displays by employees in nonworking areas.

That on or about July 23, 1999, the Respondent, at its Fishkill facility, interfered with the holding of an employee union meeting by announcing over the PA system that the entrance/exit near where the meeting was to be held, would be closed. It is the General Counsel's theory that by making this announcement, the Employer encouraged its employees to utilize other exits at the end of the workday and therefore bypass the location where the union meeting was to take place.

That on or about July 26, 1999, the Respondent, at its Poughkeepsie facility placed security personnel in the vicinity of the area in a parking lot where a union meeting was to be held and by so doing, and by checking IBM badges, thereby engaged in surveillance and intimidated employees from attending the meeting.

The Respondent takes the position that the signs were very large and contrary to its policy prohibiting employees from displaying any large signs, irrespective of message. As to the events of July 23, 1999, the Respondent denies that it announced that it was closing the exit near where the union activity occurred and did not, in any way, attempt to interfere with employees attending that meeting. As to July 26, 1999, the Respondent acknowledges that it stationed security personnel at the entry points to the parking lot. It asserts that it did so, not in order to surveil the union meeting or to intimidate employees from attending, but in order to prevent nonemployees from trespassing onto its property.

On the entire record in this case,[1] including my observation of the demeanor of the witnesses and after reviewing the briefs filed, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed that the Union, Communication Workers of America, Local 1120, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Campaign Commences

In the spring of 1999, IBM notified employees that it was going to make certain changes in its pension benefit program. (The nature of these changes is not relevant to this case.) Nevertheless, these proposals upset some of its employees and this generated a substantial amount of employee discussion. That discussion took place not only in company corridors and cafeterias but in chat rooms on the Internet.

Peter Plavchan, an employee, began to post notices in a Yahoo chat room called "IBM Union" and suggested, in that fo-

[1] We find no merit in the Charging Party's argument in cross-exceptions that the circumstances of this case warrant companywide posting of the remedial notice.

[1] Before the close of the hearing, I made arrangements for photographs to be taken and transmitted to me. Additionally, after the close of the hearing, I invited the parties to present five photographs each of the East Fishkill and Poughkeepsie sites. All of these photographs have been received by me and are made part of the record.

rum, that the employees start thinking about the possibility of union representation. It appears that Plavchan posted a notice announcing that there would be a meeting held on July 12 at the Best Western Hotel in Poughkeepsie.

On July 12, 1999, there was a meeting that was attended by a large number of employees.[2] Also in attendance were representatives of two unions (CWA and IUE), who spoke about their respective organizations. Plavchan conducted the meeting and introduced the union representatives to the employees. This meeting was reported in the July 13 edition of the Poughkeepsie Journal which also contained a picture of Plavchan's van having a hand painted bed sheet stating, "IBM Union Yes."

Another similar but somewhat smaller meeting was held at the Best Western about a week later.

Subsequently, Plavchan and other employees who were active supporters of unionization, selected the CWA as their vehicle for unionization. They thereupon set up meetings to be held in IBM parking lots as the next step. Plavchan and others organized and took steps to notify employees that there would be a meeting held at the East Fishkill site on July 23, 1999, and at the Poughkeepsie site on July 26, 1999.

B. East Fishkill

Plavchan announced that there would be parking lot meetings held at East Fishkill and Poughkeepsie, respectively on July 23 and 26, 1999. This announcement was made by way of the Yahoo chat room and by the distribution of about 500 flyers to employees in the company cafeterias. Additionally, mention of the meetings was made in the local newspapers. The flyers announced that the meetings would be for the purpose of signing up with the CWA. At East Fishkill, it was announced that the meeting would take place at 5 p.m. on July 23, 1999, at the parking lot outside of building 320.

The announcements indicated that the meetings would be held on company property at times when shift changes were taking place, That is, on nonworking time at nonworking locations. There was, however, nothing in any of the announcements to indicate that these meetings were to be attended only by employees and not by nonemployee union representatives. As such, Susan Neiss, the East Fishkill site security manager, credibly testified that upon hearing of the planned July 23 meeting, she became concerned that there was a possibility that nonemployees would come onto IBM property. (In fact, as it turned out, some nonemployees did enter the property on July 23.)

The East Fishkill site is a 1000-acre property on which there are 65 buildings, housing approximately 8000 employees. On the east side there is a research park containing a number of buildings, including building 320. The west side is dedicated exclusively to IBM research and development.

The perimeter of the site is enclosed by a low fence and there are no-trespassing signs posted. There are parking areas adjacent to the buildings and there are seven roadway gates to the property. Of the seven gates, two are considered main gates, these being gates 1 and 7. These have arms that can swing up and down through the use of IBM badges. (If the arms are down, a badge is needed to gain vehicle entrance but is not needed to exit as the arm automatically swings open to allow cars to leave the property.) [3] The other gates, when closed, are locked and entry or exit from them is inaccessible by ordinary means. (Other than climbing over a fence.) Normally, during the hours of 6 a.m. to 8 p.m., gates 1, 5, 6, and 7 are kept open to accommodate traffic.

The East Fishkill site has an internal network of roadways which are patrolled by security personnel. Unauthorized people are not allowed to enter the site and if, for example, a bicyclist is found riding around, the security people will tell the person that this is private property and that he or she has to leave.

On July 23, 1999, Supervisor Joseph Bognaski, telephoned Plavchan on two occasions and asked if he was going to put up his sign on his van at the parking lot meeting. He told Plavchan that this would violate the Company's solicitation policy. Plavchan took the position that he had the right to use the sign because the property was owned by New York State and leased by IBM. Bognaski reiterated that such a sign would be contrary to company policy and according to Plavchan, said that if he went ahead with the sign, he would have to "write him up." Both understood that they were talking about the large hand painted sheet that Plavchan had draped over his van on a previous occasion off the property. According to Plavchan, he was intimidated by Bognaski's message and decided not to risk anything by using his prounion sign. Although denying that he used the words "write up," Bognaski testified that he told Plavchan that if he displayed the sign, he would be counseled and that such a display would violate company policy.

At about 4 p.m. on July 23, 1999, Plavchan parked his van in the parking lot near gate 1, which is located at the north east part of the site at Route 52 and Palen Road. This, as described above, is one of the two main gates to the site and the gate is normally kept open at this time of day to accommodate people leaving work and the people coming into work.

Plavchan noticed that the arm to gate 1 was down, which therefore required people entering the property by car to use their badges. (Anyone without a car, could simply walk over to the parking lot where Plavchan parked his van.) He also noticed, over time, that not too many people were leaving through this gate and, therefore, very few people stopped by his van on their way out of the site to discuss unionization. By having the arm down, this had the affect of backing up traffic coming onto the site from Route 52 and Plavchan, being resourceful, made use of this fact to talk to and distribute union literature to the occupants of vehicles slowly making their entrance to the site through gate 1.

Unbeknownst to Plavchan, Susan Neiss had determined that there was a possibility that nonemployees would be entering

[2] The record indicates that there is some ambiguity as to the number of employees who attended the meeting. But whether it was 1000 as testified to by Plavchan or 400 as indicated in the newspaper article, this is essentially irrelevant to this case.

[3] The company utilizes badges that are electronically coded to allow its employees or other authorized individuals access to designated gates, buildings, and areas within buildings. These are obviously designed to allow access only to authorized personnel and the evidence in this case, indicates that the use of these badges is considered by both management and employees to be important.

onto the Company's property and decided to secure the property by closing some of the entrances. She ordered that except for gates 1, 5, and 6 all other gates be closed. As to gates 1 and 5, she ordered that the arms be put down so that people seeking access would have to use their IBM badges. As to gate 6, she ordered that this be staffed by two security people who could make a visual inspection of badges. Thus, pursuant to her orders, anyone entering the site by vehicle would have to use or show their badges at gates 1, 5, and 6 and anyone leaving the site would have to use these same gates, albeit without needing to use their badges. All other gates were closed.

Insofar as the western area of the site, employees located there were told by way of a public address announcement that "Gate 7 exiting to Route 52 is closed this evening, all employees are encouraged to use alternative exits this evening."

The event planned for East Fishkill took place with few people in attendance. Although it is impossible to say that employees did not attend because some of the other gates were closed, one affect of the Company's security measures was to make it easier for Plavchan and employee William Costine to approach and distribute union literature to employees entering the site for the evening shift.[4]

C. The July 26 Poughkeepsie Event

The union meeting here was scheduled to commence on Monday, July 26 at 5 p.m. in the parking lot adjacent to building 965. Employees had been notified of the meeting by postings on the Internet chat room and by the distribution of flyers in the cafeteria.

Shortly before 5 p.m., Plavchan took his van to the parking lot and placed his van near the roadway (Route 9), which runs adjacent to the property. (I should note that this is a parking lot of considerable size.) There is an entrance to the property off of Route 9 which is designated gate A-1, and this has a movable arm which opens for entry by use of the IBM badge. There is also a walkway between Route 9 and the parking lot which is easily accessible to the parking lot by pedestrians. An additional walkway enters the parking lot from the south side which is on IBM property.

Knowing that there was going to be a meeting at the parking lot, the Poughkeepsie site security manager, Cathy Delaney, spoke to Ms. Neiss from East Fishkill and was informed that nonemployees had trespassed on that site on the previous Friday. She therefore decided to take certain actions as follows. Orange cones were set up at the entrance to the parking lot where the meeting was to be held so that cars entering that lot would have to enter in single file and show their IBM badges to security officers. Additionally, a security officer, in a car, was placed near the walkway between Route 9 and the lot. Finally a security officer was assigned to monitor the southern walkway. Although the evidence was that the security officer at the vehicular entrance did check badges of those entering, there was no credible evidence that the names of any people who entered the lot were recorded.[5]

The General Counsel and the Union contend that these security measures were taken with the intention of engaging in surveillance of employee union activity and in order to discourage employees from entering the parking lot to talk to Plavchan and the other employees who were engaged in union activity. The Respondent contends that these were reasonable measures taken to prevent the reasonably expected possibility that nonemployees would enter onto its property.

D. September 14, 1999

On September 14, 1999, IBM conducted an event called "A Day In Time" at the Poughkeepsie site. This was a kind of celebration/fair for the employees at this site.

Plavchan and Costine came to the event and while there, engaged in a number of union activities including solicitation and distribution of union literature. Additionally, Plavchan decided to cover his van with his hand painted "Union Yes" sign and Costine put a large prounion sign on the back window of his vehicle. Plavchan's sign was about 4 feet by 8 feet and Costine's sign was about 2 feet by 4 feet. At one point, Delaney and another security officer asked Plavchan to remove his sign but he refused, stating that he believed that he had the right under Labor Law, to display his sign.

According to Plavchan, on the following day, his supervisor, Carter, told him that he shouldn't have displayed his sign and that IBM "doesn't want to fire anybody." Plavchan replied that he had the right to display such signs and asked for a written policy that prohibited the display. During a period of time when Carter was on the road, he and Plavchan exchanged e-mail messages about the Company's policy and eventually Plavchan obtained a copy from the Company's intranet site. Carter denied that he made any type of threat to Plavchan and the fact is that Plavchan did not receive any type of disciplinary action with respect to this incident.

Costine testified that several days after September 14, he was told by Manager Peter Yablonsky that he was going to be "written up" because of the sign he displayed. Costine states that he responded that he had the right to display such signs under the law. According to Costine, he specifically requested a statement in writing as to whether he would or would not be fired for displaying the sign and was told that it was not grounds for dismissal. Consequently, Costine has continued to display his 2-by-4 foot sign, testifying that he felt sure that he would not be fired and at worst would only get a warning. Yablonsky, although acknowledging that he spoke to Costine about the sign being contrary to company policy, denied making any sort of threat to Costine.

Apart from the alleged threats which were denied by company witnesses, it is acknowledged by Costine and Plavchan

[4] William Costine who works on the west campus, recalled hearing the announcement that some of the gates were closed. He testified that he heard the announcer say that gate 7 at Palen Road and Route 52 was closed. But it was clear from his testimony that he was not sure about what he heard and the company offered competent evidence to show that the announcement merely stated that gate 7 was closed. This announcement was made in the west campus only because the people working there tended to use that gate to exit the property onto Route 52 at the end of their workday.

[5] The Respondent produced evidence that the instructions to the security officers were to ensure that anyone entering the parking lot and grounds were IBM employees or have an IBM business need to be there and to *not* take down any names or license plate information.

that neither has received any kind of disciplinary action for the display of the signs on September 14 or for Costine's continued display of his sign after that date. On the other hand, the Company insists that its policy regarding large signs on company property is legal and it does not renounce the possibility of imposing discipline to employees who violate the policy.

The Company's posted rules relating to the issues involved in these proceedings are as follows:

> The orderly and efficient operation of IBM business requires certain restrictions on solicitation of employees and the distribution of material/information on company property.
>
> Commercial solicitations or distribution on IBM premises on behalf of non-IBM business enterprises are prohibited at all times.
>
> IBM employees may not engage in oral solicitations interfering with work during working time, other than for IBM business purposes.
>
> IBM employees may not engage in the distribution of materials in working areas or during working time of the employees distributing or the working time of the recipient, other than for IBM business purposes.
>
> Non-IBM employees or organizations have no right to enter IBM property, including parking lots, for the purpose of soliciting or distributing information to IBM employees, and will be reused access for any such purpose.
>
> In the above, "working areas" do not include such areas as parking lots, restrooms and cafeterias; and "working time" does not include such time as before or after work, break or lunch periods.
>
> Parking Lots are for the convenience of employees, authorized business visitors and other invitees of IBM. The parking lots are not to be used for commercial or political purposes. Employees are prohibited from having signs on their vehicles in parking lots when in the judgment of the facility's manager, the prominence, size, etc., of the sign indicates that the vehicle is being used for commercial solicitation or advertising.

There was some evidence that employees, from time to time, put "for sale" signs in the windows of cars; that some employees use sunscreens on their front windshields; and that others have displayed bumper stickers. However, none of these kinds of signs would be similar in size to the large sign displayed by Plavchan. Moreover, the Company presented evidence that it has ordered employees to remove "for sale signs" from cars left in the parking lot for extended periods of time and that it would compel employees to remove bumper stickers or sun screens where the content was offensive.

III. ANALYSIS

The first issue deals with the Respondent's reaction to the meetings held at the company parking lots on July 23 and 26, 1999. The question is whether they were reasonable actions taken in response to the possibility of nonemployees trespassing on its property, or whether they were unreasonable actions designed to prevent or discourage employees from attending union meetings.

The second issue deals with the question of whether the employer has the right to prohibit employees from displaying large prounion signs on their vehicles, in company parking lots,.

a. The East Fishkill meeting

In the case of the planned meetings at East Fishkill on July 23 and at Poughkeepsie on July 26, electronic and physical notices were distributed to employees notifying them that union meetings would be held on company property on the respective dates. Employees were informed that the gatherings were to be a "union sign-up party" and that they should look for the "union van." The notices did not indicate that only employees were invited to the events and anyone reading the notices could reasonably suspect that nonemployee union representatives would also be present. And in fact, such representatives did enter onto IBM's property on July 23, 1999.

At the East Fishkill site, the security manager, fearing that there might be trespasses took minimal security measures to deal with that possibility. She had some of the unattended entrances closed and had the arm at gate 1 (at the East complex and near the meeting), put down so that people entering had to use their badges to lift the gate. (Those leaving merely had to drive up to the gate which, having sensors, automatically lifted the arm.) While Costine testified that he heard, while at the West Complex, an announcement which he somehow interpreted as meaning that gate 1 at Route 52 and Palen Road was closed, the evidence indicates that he was mistaken. In this respect, the record demonstrates that employees in the West Complex were merely told that gate 7, which also leads out to Route 52, was closed.

The security measures taken by the Company at East Fishkill did not and could not have prevented employees from stopping off and attending the union meeting. Indeed, putting down the mechanical arm at Gate 1 had the effect of backing up traffic at the gate and making it easier for Plavchan and Costine to talk to and distribute union literature to the drivers entering or leaving the facility.

b. The Poughkeepsie meeting

More serious security measures were taken on July 26 at the Poughkeepsie site. It is noted that by this time, the Company was aware that nonemployees had come onto its property during the East Fishkill, July 23 meeting.

On July 26, the Company partially blocked off the entry way to the parking lot where Plavchan parked his van and had security officers placed at the vehicular entrance checking IBM badges to ensure that those entering were employees of the Company and not outsiders. Additionally, the Company stationed two security officers in vehicles at the two pedestrian walkway entrances to the parking lot. From Plavchan's point of view, these measures could reasonably be viewed as surveillance of union activity and as measures designed to discourage employees from entering into the parking lot to attend the union meeting. From the Company's point of view, these were reasonable measures taken to prevent entry onto its property by non-employees (i.e., trespassers).

Absent special circumstances not present in this case, an employer may bar from its property nonemployee union support-

ers. *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).[6] Put more prosaically, whether I own or lease property, I have the right, for good reason or ill (or no reason at all), to prevent my neighbor's well behaved children from playing on my front lawn.

An employer can take reasonable steps to insure that people who are not employees (as opposed to off-duty employees), are prevented from trespassing onto its private property. In *Teksid Aluminum Foundry,* 311 NRB 711, 715 fn. 2 (1993), the Board affirmed the administrative law judge's conclusion that the company did not engage in unlawful surveillance when it posted security guards at its plant entrance and established a procedure whereby persons seeking entry had to sign in and out. The administrative law judge, citing *Hoschton Garment Co*., 279 NLRB 565, 567 (1986), stated that employers "have a right to respond to an organizational campaign by establishing procedures for denying unauthorized persons access to their facilities, and any incidental observation of public union activity by security guards is not unlawful."

Faced with the possibility that nonemployees would wind up on IBM's property, it is my opinion that the Respondent had the right to take reasonable security steps to make sure that this did not happen. The steps taken on both days, including the posting of security guards at the vehicular and pedestrian entrances to the Poughkeepsie parking lot, were reasonable measures to insure that trespassing by nonemployees did not occur. As the evidence does not show that the security guards recorded the names or other identifying information of any employees who entered the lot to attend the union meeting, it is concluded that these means were reasonable, and to the extent that the security officers incidentally observed employee union activity, this did not amount to unlawful surveillance.[7]

c. Prounion signs

Plavchan prepared a large hand painted sign on a bed sheet soliciting employees to support a union at IBM. He had planned to use this sign at the East Fishkill meeting on July 23, 1999, but was dissuaded after talking to his supervisor. In this regard, Plavchan testified that he was told that if he used the sign he would be "written up," whereas Bognaski testified that he told Plavchan that such a display would violate company policy and that he would be counseled.

In any event, Plavchan and Costine brought their signs to a company event held at the Poughkeepsie site on September 14, 1999. Here they displayed their signs by placing them on their vans that were parked in a company parking lot. The Plavchan sign was about 4 feet by 8 feet and covered his van. Costine's sign was somewhat smaller, about 2 feet by 4 feet and was hung on the back of his van. Both of these signs were much larger than the typical "for sale" signs used by employees or bumper stickers on employee vehicles. Costine's sign was about the same size, or perhaps a little larger, than sun screens that employees use during the summer.

There is no dispute that the Company did not want and does not now want these signs or similar signs placed within its property. Both Plavchan and Costine were told, after September 14, 1999, that the display of their signs contravened company policy. Although there is a high degree of ambiguity as to whether these employees were told that they would be "written up" or "counseled" if they continued to use their signs, the fact is that neither received any disciplinary action for their use of the signs. And in the case of Costine, after he inquired of his supervisor as to whether he could be discharged for using his sign, he was told that he would not. Indeed, after the latter communication, Costine has continued to use his sign without incident.

Notwithstanding the lack of actual disciplinary action taken against either Costine or Plavchan for using their signs, the Company indicates that it reserves the right to enforce its rules relating to solicitations and the use of large signs in parking lots. This being the case, and as the employees in question were notified that the use of these signs contravened company policy, they could reasonably conclude that the continued use of the signs could result in future disciplinary action against them.

The display of signs, union insignia and other visual means of supporting a union fall within the category of solicitation and there are a fair number of Board decisions dealing with this kind of activity. It is, I think, important to make a distinction between the previous issue which dealt with whether the employer had the right to take reasonable steps to secure its property from the trespass of outsiders as opposed to the issue here, which involves the activity of its own employees who are invitees on the Company's property because of their employment relationship.

In *Firestone Tire & Rubber Co*., 238 NLRB 1323 (1978), an employee and shop steward was told that he could only continue to use the company parking lot if he removed from his car, several large signs, one stating "Don't Buy Firestone Products." This parking lot was used primarily by company employees but also was used by visitors. When the individual refused to remove the signs, he was disciplined. The Board, citing the Supreme Court's decisions in *Eastex, Inc. v. NLRB*, 434 U.S. 1045 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976); *NLRB v. Babcock & Wilcox Co.*, supra; and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), stated inter alia,

> In an unbroken line of decisions, this Board and the Supreme Court have stated that where an employee exercises his Section 7 rights while legally on an employer's property pursuant to the employment relationship, the balance to be struck is not vis a vis the employer's property rights, but only vis a vis the employer's managerial rights. The difference is "one of substance," since in the latter situation Respondent' managerial rights prevail only where it can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of Respondent's operations. . . .

[6] No contention is made here, nor could one be asserted, that the Union had no reasonable means of communicating with employees.

[7] In my opinion, the actions taken by IBM in relation to the possibility of trespass were far less intrusive on employee union activity than the actions taken by the employer in *Yenkin-Majestic Paint Corp*., 321 NLRB 387, 395 (1996), where the Board found that the employer violated the Act.

> The facts clearly reveal that but for the fact that the parking lot was located on Respondent's premises, Knight was clearly engaged in protected concerted activities. This Board has long held that actions taken in sympathy of other striking employees fall within the protection of Section 7 of the Act . . .
>
> [T]he Administrative Law Judge cites *Cashway Lumber Inc*., for the rule that an employee does not have a right to affix union posters on the employer's walls and property. However, this case is clearly distinguishable since *Cashway*, supra, stands only for the proposition that an employee is not engaged in protected activity if he defaces the employer's property. The mere presence of an automobile on which signs have been attached does not constitute the defacement of the property on which it has been parked.
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> . . . .
>
> This case does not present a situation analogous to *Southwestern Bell Telephone Co.* supra, where a message printed on shirts worn at work . . . was found to be "offensive, obscene or obnoxious," thereby justifying the employer's actions taken against employees who refused to remove them or cover them up. Here . . . the boycott signs were not taken into Respondent's work areas, did not interfere with Knight's ability to perform his assigned tasks, and did not otherwise interfere with Respondent's managerial rights. Here, the record clearly reveals that the parking lot was primarily used by employees not then at work and was an appropriate forum for communication among them. The fact that other persons not employed by Respondent may have had access to the parking lot and accordingly have had occasion to read these signs in insufficient reason for Respondent to be able to control an employee's exercise of his Section 7 rights.

In *Coors Container Co.*, 238 NLRB 1312, 1319 (1978), employees of Coors during the course of an economic strike by other employees of a related company, showed their sympathy by placing signs in their vehicle windows stating; "Boycott Coors-Scab Beer." The company barred the display of such signs on its property. The administrative law judge rejected the company's contention that the signs were not protected under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), for allegedly disparaging the product of Coors. He also held, with Board approval, that the use of the signs was a legitimate form of solicitation which did not interfere with production or discipline. The Judge noted:

> Here there is no showing of such special circumstances. Certainly none existed in the circumstances surrounding the display of the sign by Mugge and Clemente. The sign was displayed inside "Clemente's" truck. They were some distance away from any work location. There had been no incidents among Respondent's employees arising out of the strike, and, in any event, the wording of the sign was not unduly provocative. The Board has long recognized that the term "scab" is not so opprobrious as to justify barring its use in the workplace…
>
> As to the general prohibition against the display of boycott sings, no special circumstances were shown to exist anywhere on Respondent's premises which would justify, in the interest of the maintenance of production and discipline, restricting the employee' right to engage in such activity. . . . I therefore find that the rule promulgated by Respondent prohibiting the display by employees of boycott signs was violative of Section 8(a)(1) of the Act. Similarly, Respondent violated the Act . . . in asking Mugge and Clemente to remove the sign . . .

In *Colonial Stores Inc.*, 248 NLRB 1187, 1189 (1980), the Board held that an employer violated the Act by discharging an employee who used a sign to make a protest regarding the employer's handling of a grievance. The Board stated:

> [I]nformational picketing and leafleting, even in the face of a contractual no-strike provisions, are in furtherance of contractual grievance procedures and, hence, protected by the Act. This is true so long as an employee engaging in such activity does not thereby seek to circumvent the bargaining representative and engage in direct negotiations with the employer. Picketing during non-work time in order to advertise a grievance has been analogized to presenting the employer with a written list of grievances . . . .
>
> We further find that the protest was not undertaken in an unlawful manner. Contrary to Respondent, the protest did not constitute a strike in violation of the contractual no-strike agreement. While asserted . . . that its operations were disrupted, [it] admitted that no employees stopped work and no customers left the store due to the protest. The sign on its face urged no such action, and neither Whitmore nor her husband verbally urged any interruption of Respondent's business. We have held that a sign displayed on an employee's car, which does not interfere with production, threaten disruption of the employer's operations, or convey a message which is "offensive, obscene or obnoxious" may be an appropriate medium for communication among employees.

United Technologies Corp., 279 NLRB 973 (1986), reversed and remanded sub nom. *Machinists Lodge 91 v. NLRB*, 814 F.2d 876 (2d Cir. 1987), involved a company rule prohibiting large signs or banners on employee vehicles in company parking lots. The ban applied only to large signs and specifically allowed the use of less conspicuous items such as bumper stickers and window signs and had no affect on other means of communication such as literature distribution and oral solicitations. A Board majority (Dotson and Johansen, with Dennis dissenting), concluded that the rule prohibiting large signs or banners did not violate the Act. In reaching this result, the majority opined that employee protected rights had to be balanced against the managerial and property rights of the employer. Concluding that the employer's policy was not a complete ban on the display of union material on employee vehicles, the majority distinguished its previous decision in *Firestone Tire & Rubber Co.,* supra and held that the Respondent had "simply taken reasonable measures to prevent its employee parking lots from being transformed into havens for distracting billboards for all causes imaginable."

The Union appealed the Board's holding to the Second Circuit that concluded that the Board had departed from estab-

lished and longstanding precedent. Discussing the history of the law relating to solicitations by employees on company property, the court noted inter alia;

> Once an employer brings an employee onto company premises to work, as is the case here, the employer cannot assert its property interests as a basis for limiting protected speech by that employee. . . . In this situation the employer must rely exclusively on its managerial rights. . . .
>
> Managerial rights decisions make clear that any restriction of employees' on premises communication in nonworking areas during nonworking hours "must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances making the rule necessary." . . . In light of this presumption of unreasonableness, the Board and the courts have consistently imposed on employers the burden of proving "that the restrictions are necessary to maintain production or discipline or otherwise prevent the disruption of [company] operations." . . . In addition, the Board has recognized that legitimate safety concerns are among the managerial interests that may overcome the presumption of invalidity and justify restriction of employees' protected speech.
>
> The only interest identified by the company . . . was the company's concern over the appearance of its employee parking lots. Undeniably, this is a legitimate property interest, but it would only enable the company to limit protected speech by non-employees. In order to conclude that the employer's aesthetic concerns are legitimate managerial interests; however, the Board would have had to find that the appearance of the employee parking lots had some effect on productivity, discipline, safety, or efficiency.

In the present case, the Respondent presented witnesses to support its claims that the prohibition against large signs in company parking lots was justified by safety concerns and by concerns about its corporate image.

The contention that people driving on the private streets on IBM's property would be sufficiently distracted so as to present a safety hazard is not convincing. The speed limit, at most, is 30 mph and the population of people using these roads is a mature and sober lot. Thinking about this matter while driving home from Manhattan and passing dozens of large billboards at 60 mph, I wasn't convinced that the two signs displayed in the IBM parking lot, could have caused a hazardous condition on the internal roadways on the Respondent's property.

Nor am I persuaded by the evidence produced by the Respondent in support of its corporate image argument. It is true that at the Poughkeepsie site, there are visitors who come to the various buildings to participate in conferences and presentations designed to sell very large and expensive machines. The visitors who do come are often high level corporate officials from either new prospective customers or old customers who may want to buy more new stuff. IBM obviously wants to make a very good impression on these people who may or may not choose to place orders valued in excess of $1 million. In this respect, IBM has to compete with other computer vendors such as Sun Microsystems, Hewlett-Packard, or Hitachi.

But the fact is that the signs used in this case were placed in a parking lot and not in the immediate vicinity of the buildings where prospective customers are invited. Moreover, no effort was made by union supporters to interfere with or dissuade these prospective customers from doing business with IBM. The people who arrive as potential customers are, I suspect, sophisticated people who may have dealings of their own with unions in their own bailiwicks. I respect the company's desire to protect and preserve its corporate image. But I cannot say that the display by a couple of employees of these particular two large signs on their vehicles would be the kind of conduct which would tend to tarnish that image.

In my view, the majority opinion of the Board in *United Technologies* supra, constitutes an anomaly and was contrary to longstanding Board and court precedent. The problem, I think, was the assertion of a standard balancing managerial *and* property rights against employee speech rights where the judicially approved standard had always been to balance only the employer's managerial rights against the employees' free speech rights. Therefore I shall recommend, in the present case, that the Board reaffirm the *Firestone* standard.

As the company has published a rule barring large signs in parking lots and as the two employees, Plavchan and Costine, were specifically told that their actions were violative of company policy, I shall conclude that the Respondent violated Section 8(a)(1) of the Act, even if there had been no explicit or implicit threat of disciplinary action. *Comcast Cablevision*, 313 NLRB 220 fn. 3 (1993). As the company still reserves the right to enforce this rule, even if has not done so in the circumstances of this case, its employees can reasonably believe that continued display of such signs may result in future disciplinary action against them.[8] Moreover, even if Plavchan was not told that he would be written up if he displayed his sign, his supervisor admittedly told him that he would be counseled if he did so. While this does not necessarily translate into a typical threat, I must say that as a statement by a supervisor that the employee is engaged in conduct which is viewed as a violation of company policy, this can lead a reasonable person to believe that continued violation of the rule could lead to a future adverse action.

CONCLUSIONS OF LAW

1. By maintaining a rule and telling employees that this rule prohibits them from displaying prounion signs on their vehicles in company parking lots, the Respondent has violated Section 8(a)(1) of the Act.

2. The Respondent has not violated the Act in any other manner alleged in the complaint.

3. The aforesaid violation affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

[8] I thought that the witnesses presented by the Union and the company were equally credible.

desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, International Business Machines Corporation, Poughkeepsie and East Fishkill, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, in force and effect, a rule to the extent that it would preclude its employees from displaying signs supporting the Communications Workers of America, Local 1120, AFL–CIO, or any other labor organization, on their cars while parked in company parking lots.[10]

(b) Telling employees that the display of large signs on their cars in company parking lots in support of a union, constitutes a violation of company policy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in East Fishkill and Poughkeepsie, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 23, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain, in force and effect, a rule to the extent that it would preclude employees from displaying signs on their cars while parked in company parking lots, supporting the Communications Workers of America, Local 1120, AFL–CIO or any other labor organization.

WE WILL NOT tell employees that the display of large signs supporting a union, on their cars in company parking lots constitutes a violation of company policy.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the rights guaranteed you by Section 7 of the Act.

INTERNATIONAL BUSINESS MACHINES CORP.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[10] The import of this recommended order is not to prevent the company from promulgating or enforcing rules relating to signs, banners or any other types of displays, except as to signs that are related to or in furtherance of employee rights protected under Sec. 7 of the National Labor Relations Act.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."